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No. [redacted] 28

Supreme Court of the United States

OCTOBER TERM, 1935

KVOS, INC., a corporation

Petitioner,

vs.

THE ASSOCIATED PRESS, a Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

CLARENCE C. DILL,
Bowen Building,
Washington, D. C.

KENNETH C. DAVIS,
Northern Life Tower,
Seattle, Washington.

WILLIAM H. PEMBERTON,
Olympia, Washington.

Miller & Richardson Printing Co., Bellingham, Wash.

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No.....

Supreme Court of the United States

OCTOBER TERM, 1935

KVOS, INC., a Corporation,

Petitioner,

vs.

THE ASSOCIATED PRESS, a Corporation,

Respondent.

Petition

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of KVOS, INC., a corporation, for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit in the above cause, respectfully shows:

STATEMENT OF THE MATTER INVOLVED

Petitioner operates a small 100-watt radio station in the City of Bellingham, State of Washington, and its emissions, at the most, are incapable of being received at a distance greater or outside of a five-mile radius; but under no circumstances, according to good engineering advice, can such a radio station emit signals that will adequately and regularly serve a territory efficiently at a greater distance than fifteen miles from the point of operation.

This action was instituted by the Associated Press against Petitioner in the United States District Court for the Western District of Washington, Northern Division, for the purpose of securing injunctive relief against the alleged pirating of *published* and *distributed* news dispatches from three of its member newspapers, to-wit: The Seattle Post-Intelligencer of Seattle, Washington; The Seattle Times of Seattle, Washington; and the Bellingham Herald of Bellingham, Washington.

It is important at this stage to point out that Seattle is more than ninety miles away from Bellingham, Washington, and 75 miles away from the effective radius of the signals from Petitioner's Radio Station, and it was never claimed by Respondents, and in fact the District Court found (R. 511-512) that "in no instance has the defendant ever taken or pirated any of the news claimed by complainant or its members *before such news items were published and distributed* to the public in the regular editions of the newspapers of complainant members." (Italics ours.)

Petitioner repeats, at no time was it ever alleged or found that Petitioner took any news, if at all, from Respondents' member papers before they were published and regularly distributed in the regular course of their business, and it can be safely pre-

sumed that their publication and distribution had been completed in their respective localities many hours before they could possibly have reached *a point ninty miles distant.*

The District Court, upon the Bill of Complaint and Affidavits of Respondent, and upon an exparte showing, issued a Temporary Restraining Order against Petitioner and an Order to Show Cause why the injunctive relief requested by Respondent should not be granted (R. 37).

Upon the return to the Order to Show Cause, the Petitioner filed a Motion to Dismiss supported by Affidavits (R. 42-45-60). At the hearing it was conclusively shown by Petitioner that the Associated Press sold no advertising and that the Petitioner and Respondent were not in any sense of the word in competition with each other. In fact, Respondent in its written brief in the Circuit Court of Appeals, at Page 10, stated that the Associated Press—"makes no profits and, as a distinct entity, is not deprived of any profits by the piracy of its news items."

The District Court, after such hearing and argument, took the matter under advisement and subsequently rendered its written opinion dismissing the Bill (R. 465).

The District Court found that Petitioner and Respondent were not in competition; that while the

Petitioner has *"in some specific instances"* (R 511) broadcast news taken from said member newspapers, the Court added—

> "**in no instance has the defendant ever taken or pirated any of the news claimed by complainant or its members, before any such news items *were published* and *distributed* to the public the regular editions of the newspapers of complainant members." (R. 511) (Italics ours.)

The District Court found that no unfair competition was practiced against the Associated Press, and that the actions of Petitioner were no more than was customary with the ordinary newspaper rewriting and publishing from other *published and distributed newspapers* with full propriety under the law. The District Court premised its decision in this respect upon the authority of a legal textbook, "The Rights and Privileges of the Press" wherein on page 87, it is set forth:

> "Whether an afternoon newspaper may lift from a morning paper has never been decided by the courts, but the *custom* of the profession *seems to sanction* such practice." (Italics ours.) (R. 477).

Petitioner emphasizes that a controlling analogy is thus created between an afternoon newspaper and a morning paper, as cited, and two newspapers and a small 100-watt radio station *ninety miles away*.

The District Court further found that respondent had no property right in news *after* it had been so *published* and *delivered* to the public in the ordinary course of distribution as against the right of Petitioner's radio station to redistribute said news without direct profit and gratuitously to the public. *and as long as said radio station did not resell it* as a news gathering agency of the same type and character as respondents. (R. 489).

The District Court found that Petitioner did not "ever derive any profit, either direct or nominal therefrom." (*R.* 512). The District Court further found that the case of International News Service vs. Associated Press, 248 U. S. 215, did not apply to the case at bar as that was a contest between two news gathering agencies in the keenest of competition with each other over the gathering and distribution of news *before distribution.* (R. 484).

Petitioner can more clearly set forth the remainder of the facts in this Petition by quoting specifically a portion of the District Court's decision, as this case chiefly involves important questions of law:

> "***This court holds that when general news furnished by complainant, or local news claimed to be under its control as regards publication, *has been printed in a regular issue of complainant's member newspapers and that is-*

sue has been, in the ordinary course, published and distributed to the public, such news reports from that moment belong to the public, including the defendant and all others who may desire to use them, for all purposes except for sale by a rival news agency to its news publishing members, and that the mere fact that defendant disseminates gratuitously those news reports as a part of its radio service after they have been so received by defendant contemporaneously with other members of the public, does not prevent defendant from so receiving and using such news reports, since such practice by defendant *does not involve the pirating by one news gathering and distributing agency of news reports of another such agency, as was the case in International News Service vs. Associated Press, supra.*" (Italics ours) (*R.* 489).

Feeling aggrieved at the District Court's ruling, Respondent appealed said ruling to the Circuit Court of Appeals for the Ninth Circuit. The Circuit Court rendered its decision on December 16th, 1935, reversing the decision of the District Court (*R.* 556).

The Circuit Court completely and erroneously ignored the Findings of Fact of the District Court who tried the case and was acquainted more clearly with the facts and circumstances of the parties. The Circuit Court ordered the District Court to issue a vaguely outlined preliminary injunction restraining Petitioner from appropriating and broadcasting any of the news gathered by Respondent for the period following its *publication in* Respondent's

newspapers (although Respondent owns no newspapers) during which time the broadcasting of the pirated news to Petitioner's most remote auditors may damage the Respondent's papers' business of procuring or maintaining their subscriptions and advertising. In this connection, the Circuit Court ordered consideration should be given to the likelihood of KVOS' auditors awaiting the pirated news because it is free and does not require subscription for a newspaper. (R. 581).

The chimera of Respondent's solicitude for the advertising and subscriptions to its member newspapers reared its head seriously for the first time in the Circuit Court of Appeals. In order to establish unfair competition, this element was belatedly injected into the case, although Petitioner cannot refrain from again pointing out that on Page 10 of Respondent's brief in the Circuit Court of Appeals, Respondent stated, and never claimed improvidently, that the Associated Press "makes no profits and, as a distinct entity, is not deprived of any profits by the piracy of its news items."

If not, and no harm or damage has been suffered by Respondent, then how can they maintain this action.

Thus we approach the questions presented by this Petition:

THE QUESTIONS PRESENTED ARE AS FOLLOWS:

1. Can the Associated Press, the Respondent, not being harmed or losing any profit by its own admission, maintain this equitable action for injunctive relief where irreparable harm and damage to the complainant are necessary and vital elements in such an action? If the Associated Press, admittedly a foreign corporation to the State of Washington, loses no money or profit by Petitioner's alleged piracy, how can the jurisdictional sum of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs, be involved in this case, and Federal jurisdiction maintained? Diversity of citizenship, standing alone, cannot satisfy the requisites of Federal jurisdiction. The matter in controversy must exceed Three Thousand ($3,000.00) Dollars, exclusive of interest and costs. How can this be consistently maintained by Respondent in the face of its own admission that the Associated Press is not deprived of any profits by the piracy of its news items?"

2. Even though the Respondent is a foreign corporation to the State of Washington and enjoys diverse citizenship, yet the Respondent is not the real party in interest in this cause, and if necessary parties have been omitted, and their joinder would destroy complete diversity, should not the cause be dismissed?

3. Is a small 100-watt Radio Station, using only ten per cent of its total time for news broadcasting and the remaining ninety per cent of its time for other programs, in such competition with the Respondent news gathering agency, who do not solicit advertising or subscriptions, as will sustain this action for unfair competition? Especially, in view of this Court's ruling in

International Shoe Co. vs. Federal Trade Comsion (1929) 280 U. S. 291, wherein it was said:

> "Thus it appears that in respect to 95% of the business, there was no competition in fact and no contest, or observed tendency to contest in the market for the same purchasers; and it is manifest that when this is eliminated, *what remains is of such slight consquence as to deprive the finding that there was substantial competition between the two corporations of any real support in the evidence.*" (Italics ours).

4. Since the Federal Courts have invariably held that a newspaper is not capable of being copyrighted, and that the common law rights in news ends at the point of publication, and that the courts have no judicial authority or right to place a judicial copyright on *published* and *distributed* news, what property or equitable rights, if any, remain in the *published* and *distributed* news in this action so as to justify the intervention of a Court of Equity?

Equity will protect news as long as it remains confidential, or to the point of publication as in the International News Service Case, *but no further*. The International News Service Case, supra, did not establish a property right in news. That case turned upon the question of unfair competition. Justice Pitney, delivering the majority opinion, on page 234, stated:

> *"It is not to be supposed* that the framers of the Constitution, when they empowered Congress to promote the progress of science and the useful arts, by securing for limited time to authors and inventors the exclusive right to their respective writings and discoveries (Const. Art. 1, Section 8, paragraph 8) *intended to confer upon one who might happen to be the first to report a*

historic event, the exclusive right for any period to spread the knowledge of it —

"We need spend no time, however, *upon the general question of property in news matter* at common law, or the application of the Copyright Act, *since it seems to us the case must turn upon the question of unfair competition in business.*" (Italics ours).

But, in this action the tables are turned. There is no competition. Whatever rights Respondents have must be established upon showing a remaining property right in *published* and *distributed* news. The question is thus placed squarely before the Court. *What rights remain, if any, in published and distributed news?*

There has been no stealth or unfair conduct. The news items had not acquired any "secondary meaning." There was nothing distinctive or novel about them. They were not obtained unfairly. The German case hereinafter relied upon by Petitioner, stated that the test is—*whether the items were received unfairly.*

In the International News Service case they were obtained unfairly, without question. Here they were not. The Respondents did not allege that the papers were acquired other than by being purchased, if used, on the street. Is not news thus acquired common property, and as Justice Pitney

negatively stated in the International News Service case (supra), *is it to be supposed that the framers of our Constitution intended to confer upon one who might happen to be the first to report a historic event, the exclusive right for any period to spread the knowledge of it?* Then too, in view of radio distributing the same gratuitously to the listener who neither pays tax nor toll, can the public service thus rendered without direct or even remote profit to Petitioner be distorted into an act based on unfairness? *If there is a remaining property right in such news, how long does it last? Is not that a question for the Congress?*

REASONS FOR ALLOWANCE OF THE WRIT

I. The decision of the Circuit Court of Appeals is contrary to the settled judicial practices of many years. It is axiomatic, and the rule has almost become a maxim in settled equitable procedure, that irreparable harm and damage must be affirmatively shown in order to justify the intervention of a Court of Equity, or to grant injunctive relief. The Circuit Court ignored this plain rule. The decision of the Circuit Court completely ignored the District Court's findings of fact, who was on the ground, so to speak. The Circuit Court ignored the rule that the right of a litigant to injunctive re-

lief must stand or fall upon the sufficiency of the averments in the Bill of Complaint showing the existence of such special and extraordinary circumstances as are sufficient to bring the case within some acknowledged head of equity jurisdiction. The sufficiency of the bill was challenged. It was urged that the bill set forth no facts, which, if true, would entitle Respondent to the relief prayed for in a Court of Equity, or to any injunctive relief in this cause. In view of these considerations, the District Court denied Respondent's Motion for a Preliminary Injunction. In positive disregard of the District Court's Findings, and notwithstanding Respondent's naked admission that it suffered no harm as a consequence of Petitioner's actions, the Circuit Court erroneously reversed the decision of the District Court.

II. The decision of the Circuit Court resorts to speculation, vague and remote allegations in the Bill of Complaint and Affidavits, in finding the jurisdictional amount of the matter in controversy exceeds Three Thousand ($3,000.00) Dollars, exclusive of interest and costs.

III. That the issues presented by the Circuit Court's erroneous decision present a new and novel question of great moment to the public, to radio broadcasting stations in this nation, and to news-

paper publishers and publishing associations. That the Circuit Court has erroneously and improvidently usurped the functions of Congress in granting Respondent relief in this case. Only Congress can grant such relief. The Circuit Court has legislated, so to speak, on a question *refused* by the First Session of the 48th Congress as early as 1884, when the Senate Committee on the Library reported that Senate Bill No. 1728, which gave published news *eight hours* protection, should not pass. In the case at bar, the District Court was compelled by the Circuit Court to give the Respondent 18 *hours* protection for its published news. (See Appendix "A" for Preliminary Injunction, and Appendix "B" for Petitioner's Proposed Preliminary Injunction which was refused.)

IV. The decision of the Circuit Court that the parties hereto are in competition with each other is contrary to and in direct conflict with the facts of this case, and the opinions of this Court in Raladam Co. vs. Federal Trade Commission, 283 U. S. 643, wherein this Court substantiated the rule that plain logic and sense decrees there should be some *real competition* in an unfair competition case. Unfair competition presupposes the existence of some substantial competition. No such competition can be supported by the facts of this case wherein only

ten per cent of Petitioner's business is engaged in giving news items away. At no time has Petitioner made merchandise of news items. Petitioner deals with the public while Respondent deals with a trade. Whether the term unfair competition is used in conjunction with the Statutes or common law, the term cannot be emasculated, circumvented by hair-lines, or so blindly applied as to justify a decision that Petitioner and Respondent are in competition with each other; or that there was unfair competition; especially so, since there has been no misappropriation. Indeed, the question and test is, *was the news received unfairly?* If not, there was no misappropriation and therefore no unfair competition. In the absence of averments of bribery or dishonest conduct as in the International News Service case (supra), it must be presumed that Petitioner received this news fairly and without fraud—namely, by purchase. That is the distinction between the International News Service Case and the case at bar. Dishonesty, in fact, was proved in that case. That element is missing in this case.

In this connection, we call this Court's attention to a case decided by the Supreme Court of Germany, April 29th, 1930, reported in "Journal of Air Law" 1931, Volume II, at page 63, and translated by Carl Zollman of the Marquette University Law School

faculty. In that case, the "tables were turned" from the facts at bar. A newspaper published and distributed gratuitiously an item about the successful landing of the Graf Zeppelin on its return from America which the newspaper received over the radio. In denying an injunction to the radio station based on unfair competition the Court held:

> "**It is not shown that the republication of the news item from the broadcast — as is here contended — by defendant in his newspaper is against public policy — "

The German Supreme Court called attention to the press convention at Geneva, August, 1927, and, stated—

> "**the experts there assembled were unable to reach an agreement in regard to the question of public policy, but were rigidly divided. The result was that merely the principle was agreed to *"that the publication of any news items is dependent on only one condition, namely, that the item should have been received by its publisher rightfully and not through unfair competition."* The intermediate Court again stresses the fact that defendant is an authorized subscriber (radio listeners pay a fee in Germany just like a purchaser of a paper pays a fee in America) and *has received the news rightfully."* (Italics and note ours).

In the case at bar, Petitioner received the news *rightfully*. We reiterate, that it is not alleged that Petitioner received the newpapers other than by

paying for them. It is not alleged that they were received wrongfully or through dishonest sources. Thus, since there has has been no public policy contravened by Petitioner's actions, nor misappropriation, nor property rights violated (because the International News Service Case (supra) expressly stated that the Court was not declaring any property right in news, as such) the test of whether there has been unfair competition must be gauged and confined solely to determining whether any actual competition exists in fact between the parties hereto.

In this respect, the Circuit Court's decision conflicts with this Court's decision in International Shoe Company vs. Federal Trade Commission (220 U. S. 291). We repeat, that only ten per cent of Petitioner's time is devoted to giving away news items. We quote from the International Shoe Case (supra):

> "Thus it appears that in respect to 95% of the business, there was no competition in fact and no contest, or observed tendency to contest in the market for the same purchasers; and it is manifest that when this is eliminated, *what remains is of such slight consequence as to deprive the findings that there was substantial competition between the two corporations of any real support in the evidence.*" (Italics ours.)

There can be no unfair competition when there is no competition. Borden Ice Cream Co. vs. Borden Condensed Milk Company, (201 Fed. 510).

Then too, we must remember that Petitioner's Radio signals cannot be heard in Seattle, ninety miles away. There is no competition between Petitioner and the Seattle Times or Seattle Post-Intelligencer. In regard to the local paper, the Bellingham Herald, the Circuit Court's own findings state the number of news items taken after publication and distribution of the paper *are but twelve* (R. 579) *in number over the course of a year.* (R. 27).

If the local paper was damaged, they should have brought the suit and their joinder would have destroyed diversity. The Seattle Times and Seattle Post-Intelligencer are presumed to have been distributed if they are received at a point ninety miles away from their point of publication. This leaves only twelve items. Their appropriation was vigorously denied by Petitioner (R. 45). *Twelve fugitive news items are too few with which to stigmatize Petitioner in a Court of Equity.*

An injunction should never issue when the damage it would cause would be relatively greater in comparison with the damage caused the Respondent by the thing sought to be enjoined. Waters vs. Phillips (284 Fed. 237); Cubbins vs. Mississippi River Commission et al, (204 Fed. 299); Kryptok Co. vs. Stead

Lens Co. (190 Fed. 767); Swift vs. Jenks (19 Fed. 641). Especially is this rule true where it is sought to enjoin a lawful business. McCarthy vs. Bunker Hill Co. (164 Fed. 927).

A fundamental rule applied by this Court is that an injunction will not be granted except in a case *reasonably free from doubt.* Exparte Young (209 U. S. 123). Then too, mere apprehension or fear does not warrant an injunction. Farmers Bank vs. Commissioners (295 Fed. 755).

V. The question is an important one to be decided by this Court. The Circuit Court has grossly misconstrued this Court's ruling in the case of International News Service vs. Associated Press (248 U. S. 215). The Circuit Court's attempt to apply the principles of that decision to the facts at bar is in direct conflict with subsequent decisions of this Court. This Court stated in Reichelderfer vs. Quinn (287 U. S. 315):

> "**Beyond the traditional boundaries under common law only some imperative justification in policy will lead the Courts to recognize in old values new property rights. *Compare* International News Service vs. Associated Press 248 U. S. 215, with Cheney Brothers vs. Doris Silk Corporation, 35 Fed. (2nd) 279."

Judge Hand, in the Cheney Brothers' case (supra) stated that the language in the International News

Service case (supra) would be limited to the actual facts as were therein involved. This Court distinctly approved this limitation of the International News Service Case (supra) as is seen by the above quotation from the Reichelderfer case (Supra). It is to be remembered that Judge Hand in the Cheney Brothers' case (supra) denied an injunction against defendant where the evidence showed defendant had been copying silk patterns under the theory that the Courts had no right or authority to deal out Judicial Copyrights. Judge Hand held that although the International News Service case (supra) involved another subject, he agreed that if that decision meant to lay down a general doctrine of unfair competition, it would be controlling of the case before him, but he stated emphatically:

> "*We do not believe it did.* While it is, of course, true that law *ordinarily* speaks in general terms, there are cases *where the occasion is at once the justification for, and limit of, what is decided. This appears to us such an instance;* we think that no more was covered than situations substantially similar to those at bar. The difficulties of understanding it otherwise are insuperable. We are to suppose that the court meant to create a sort of Common Law patent or copyright for reasons of justice. Either would flagrantly conflict with the scheme which Congress has for more than a century devised to cover the subject matter." (Meaning the Copyright Law). (Italics and notation ours).

The Reichelderfer Case (supra) very plainly and

impliedly approved, Judge Hand's limitation of the language of the International News Service case, and rightly so. To apply that case rigidly to the facts at bar, as did the Circuit Court of Appeals, is resorting to legislation, and under the Constitution, Art. I, Section 8, Paragraph 8, Congress only, is empowered —

> " — to promote the progress of science and useful arts, by securing for a limited time to authors and inventors the exclusive right to their respective writings and discoveries."

This Court recognized in the International News Service case (supra) that there is no property right in published news. While there could be unfair competition in dealing with it where dishonesty is shown, this Court did not affirm any property right in news as such. In the case at bar, Petitioner received the news *rightfully* and did not misappropriate or dishonestly acquire it. The way Petitioner received it was not against public policy. Since there is no actual competition existing between Petitioner and Respondent, that element of the Circuit Court's decision is groundless and unsound. The only legal way the Circuit Court's decision can be sustained, is for this Court to declare a remaining property right in news, as such, in the face of the following quotation on page 234 of the majority opinion in the International News Service case

(supra):

> "It is not to be supposed that the framers of the Constitution intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it.***
>
> "We need spend no time, however, *upon the general question of property in news matter at common law,* or the application of the Copyright Act, *since it seems to us the case must turn upon the question of unfair competition in business.*" (Italics ours.)

As stated, in order to sustain the Circuit Court's decision this Court is called upon to affirm a general and absolute property right in published and distributed news, as such. Thus, the issue is important, novel and momentous. It is of great importance to the public that this matter should be decided by this Court. In addition thereto, the peculiar circumstances that have arisen since the date that the International News Service case was decided, justify a further inquiry into this particular subject matter. Today, but not then, we have the radio. Tomorrow, it will be television with its facsimile portrayal of readable news items, together with a picture of the actual event, just after or contemporaneously with its happening. This Court should declare once and for all that this subject matter, as herein meagerly outlined, is a matter for Congress

and only a limited one for the Courts of the land. It is of vital importance to the public to know whether the principles of the International News Service case, (Supra) are to be limited to the facts as were therein involved; and whether this Court will countenance a Circuit Court taking a doubtful step towards legislation and concluding that the facts of this case are within those principles, which as aforesaid, were enunciated at a time when radio and its functions were never contemplated. At least, and if for no other reason than that Petitioner operates under a certificate issued by the government, conditional upon Petitioner serving the public interest, convenience, and necessity, Petitioner most emphatically urges that its pride in its past and present service to the public interest should not be stigmatized or impugned without an opportunity to be heard in this, the highest court in the land.

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and to send to this court for its review and determination on a day certain to be therein named, a full and complete transcript of the record of all proceedings in

Case No. 7798 in said court, and entitled "The Associated Press, a corporation, Appellant, vs. KVOS, Inc., a corporation, Appellee," and that said decree of the United States Circuit Court of Appeals for the Ninth Circuit be reversed by this Honorable Court and that your Petitioner may have such other and further relief in the premises as to this court may seem meet and just.

CLARENCE C. DILL,
Bowen Building,
Washington, D. C.

KENNETH C. DAVIS,
Northern Life Tower,
Seattle, Washington.

WILLIAM H. PEMBERTON,
Olympia, Washington.

Attorneys for Petitioner.

CERTIFICATE OF COUNSEL

UNITED STATES OF AMERICA,
CITY OF WASHINGTON,
DISTRICT OF COLUMBIA } ss.

CLARENCE C. DILL, being first duly sworn on oath deposes and says: That he is an attorney at law admitted to practice before the Supreme Court of the United States; that he is one of the attorneys for

the Petitioner in the above entitled cause. That he prepared the foregoing petition in good faith and not for delay. That said petition in his opinion is meritorious and well founded in law. That he has read said petition, knows the contents thereof, and believes the same to be true.

CLARENCE C. DILL,

SUBSCRIBED and SWORN to before this 18th day of March, 1936.

R. McQUESTEN,

NOTARY PUBLIC in and for the District of Columbia.
Commission expires January 24th, 1940.

No. .....

Supreme Court of the United States

OCTOBER TERM, 1935

KVOS, INC., a corporation,

Petitioner,

vs.

ASSOCIATED PRESS, a corporation,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Proceedings in the District Court and Court of Appeals

The hearing on the return to the Order to Show Cause issued in this case occurred December 3rd, 1934, before the United District Court for the Western District of Washington, Northern Division. Taking the matter under advisement the District Court on December 18, 1934, filed a memorandum decision denying the Respondent's motion for a preliminary injunction and sustained petitioner's motion to dismiss. (R. 465). The District Court entered its findings of fact (R. 508) and conclusions of law (R. 514) on the 28th day of January, 1935. The District Court entered the decree of dismissal (R. 516) on the 28th day of January, 1935. From this decree of dismissal, respondent appealed to

the United States Circuit Court of Appeals for the Ninth Circuit. The cause was argued before the United States Circuit Court of Appeals for the Ninth Circuit on the 13th day of September, 1935, (R. 555). On the 16th day of December, 1935, the Circuit Court of Appeals filed its opinion reversing the decision of the lower court (R. 556). This petition is to review said decision and judgment of the Circuit Court of Appeals.

JURISDICTION

Jurisdiction of this court is invoked under Judicial Code Section 240 (a) as amended by Act of February 13, 1925, Chapter 229 (43 Stat., 938; 28 U. S. C. A. 347).

Upon application of petitioner, for good cause shown, the period for applying for a Writ of Certiorari in this cause was extended by Mr. Justice Sutherland on March 7, 1936, for thirty days, pursuant to Title 28, U. S. Code Annotated, Section 350. This order was entered prior to the expiration of ninety days from the entry of judgment by the Circuit Court of Appeals (December 16, 1935) (R. 555). No petition for rehearing was filed.

Petitioner asks that its Petition for a Writ be granted under and by reason of the provision of the United States Supreme Court, Rule 35, Section 4, Sub-section B, in that, the Circuit Court of Ap-

peals has erroneously decided an important question of general law in a way untenable and in conflict with the weight of authority and in conflict with the decisions of this Court.

STATEMENT OF THE CASE

The allegations of Respondent's Bill of Complaint substantially sets forth, that Respondent is a news gathering agency, and that after its alleged members have published the said news reports, furnished by Respondent, the Petitioner assertedly purchased copies of these newspapers and proceeded to read to its radio audience, gratuitously, the most interesting of these items of news. (R. 2.)

There is no allegation in the Bill of Complaint that the Petitioner received profit, using the word literally, from so broadcasting these news items; nor is there any allegation that the Petitioner charges any of its listeners any consideration for this service. The only "profit" which the Respondent alleges that the Petitioner receives from so broadcasting these news items is, quoting from paragraph 11, Line 28, of Respondent's Bill: (R. 9):

> "That the object and purpose of said news broadcasts by the Defendant over said KVOS, is to popularize said radio station, by making said program interesting through news broadcasts, and thereby to induce a greater number of persons to listen to said programs, thereby enhancing the value of time of said broadcasting sta-

tion for such advertising purposes."

It is thus seen that the respondents are making an effort to come within the province of International News Service vs. Associated Press, (248 U. S. 215), and those copyright cases dealing with a statutory right to compensation for a public performance for profit of a copyright. These cases will be reviewed in detail hereinafter, and their inapplicability to the facts at bar will be manifest and apparent at a glance.

Assuming, for the purpose of argument, that the Respondent's allegations are true, yet, Petitioner contends, they are not sufficient nor do they contain any grounds to justify the intervention of a Court of Equity. *They fall entirely within the scope of the power of the Congress and are wholly without the jurisdiction of any Court of Equity.*

It must be borne in mind that this case does not involve a question on copyright law, nor is there any alleged infringement of an article protected by Statute. On the contrary, the Respondent is basing its cause of action entirely upon the common law equitable action of unfair competition.

SPECIFICATIONS OF ERROR

The Circuit Court of Appeals erred in reversing the decision of the District Court because:

1. There was no evidence to support a finding that the matter in controversy exceeded the sum of ($3,000.00) Dollars, exclusive of interest and costs.

2. The facts demonstrate conclusively that the Associated Press is not the real party in interest in this cause, and the joinder of the real parties in interests would have completely destroyed diversity of citizenship.

3. The District Court was right in holding that the Respondent's Bill of Complaint did not contain sufficient averments showing the existence of such special and extraordinary circumstances as are sufficient to bring the case within some acknowledged head of equitable jurisdiction, and that the bill, as pleaded, did not entitle respondent to the relief prayed for.

ARGUMENT

This argument is devoted entirely to the third specification of error. It would be absurd to request this Court to pass on the merits of this case twice. We understand the law to be that on certiorari, the petition should appeal to the court's discretion. For this petition, Petitioner will confine itself to the proposition that Respondent's Bill of Complaint did not recite sufficient facts to justify the intervention of a Court of Equity; that there was no un-

fair competition, and that in this case, there is no remaining property right in the published and distributed news as will sustain the decision of the Circuit Court of Appeals.

Respondent seemingly finds great solace in the case of Herbert vs. Shanley, 242 U. S. 591, where this Court defined a public performance for profit in a copyright case. The Circuit Court of Appeals erroneously adopted this ruling *on a statutory right* as the answer *to a common law right,* if any. The legal distinction between a *statutory right* and a *common law right* was ignored. The wrong charged in Herbert vs. Shanley (supra) was the infringement of a *statutory* copyright by the public performance of a musical composition. The Circuit Court recognizing the difference in the wrong charged *in that case* and the wrong charged *in the case at Bar,* stated nevertheless (R. 572-573):

> "**The difference in the wrong charged does not distinguish a ruling on the excuse for the wrong."

Such a statement is not only unreasonable, but improvidently made. A right based upon a statute and its attendant ruling is not controlling of a *claimed* right under the common law. At common law the rights in news ended at publication. At common law, a right claimed under a statute, *may not have*

been wrong. To rule otherwise, what need would there be for the legislature? The Court would be doing the legislating. Under the Common law, the Plaintiff in the Shanley case should not have recovered. His right was based on the Copyright Act.

The reasoning in the Shanley case should be considered, if it is going to be considered at all in this case, with the following statement about broadcasting in America from the textbook "The Law of Radio Communication," at page 5:

> "***American broadcasting is distinguished from all other forms of communication in that those who enjoy its service make no direct payment for if. The listener pays neither toll nor tax. The entire maintenance of broadcasting is gratuitious so far as the listener is concerned.* This is not true in other countries. Broadcasting abroad is financed upon the principle that those who receive should pay. Great Britain, second only to the United States in broadcasting development, imposes a tax in the form of a license upon receiving sets, and the operating expense is paid from the proceeds. Other countries have similar systems. In America alone is the operation of a receiving set open to everyone without tax or payment, and in no other land is the service so extensive or so efficient." (Italics ours.)

We are, frankly, attempting to impress the Court with the seriousness of this case and the public interest involved. Newspaper and radio activities are clothed in the public interest. When a newspaper

or a radio station submit their news or programs to the public voluntarily, they must be deemed to have reasonably and voluntarily dedicated their property to *public use*. They have not been *compelled* to do so. Devotion of property to public use, is a *voluntary act*. It may not be compelled. However, when one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to the control of the public, the Courts, and the legislature, for the common good.

There are no decisions in the United States directly and distinctly applicable to the case at bar. The decisions recited by the Respondent in the Circuit Court are ridiculously inapplicable.

However, the Supreme Court of Germany decided a recent case squarely against complainant's contention and which fits the facts at bar as perfectly as could any decision of any Court of competent jurisdiction in the world. This opinion was handed down by the Supreme Court of Germany, April 29, 1930, and is reported in the "Journal of Air Law" 1931, Vol. II, at page 63. This opinion was translated by Carl Zollman of the Marquette University Law School faculty.

The facts in that case are substantially the same

as the facts alleged by respondent in its Bill of Complaint with this exception—*it was a German newspaper that was alleged to have pirated news items from the news programs of a radio broadcasting station.*

The Defendant in this case was the publisher of the "Neuse Tageblatt Oebisfelde," a newspaper appearing in the City of Oebisfelde. On November 1st, 1928, at 7:30 a. m., Defendant distributed without charge and publicity posted a newspaper announcing the successful landing of the airship "Graf Zeppelin" after its historical flight to America.

The Plaintiff was a German broadcasting station, and their listeners, unlike the radio listeners of America, are licensed and pay a consideration therefor, just as the purchasers of newspapers in America. The Plaintiff broadcasting company had sent an announcer to Friedrichshafen to report and broadcast the news of the successful landing of the "Graf Zeppelin". Immediately after the radio had made this news announcement, the Defendant got out his "extra" and gratuitiously distributed it. The Plaintiff broadcasting company alleged that the Defendant had first learned of this news over his radio receiving set from the Plaintiff's broadcasting station, *and that the Defendant's newspaper had on previous instances made similar use of information*

received in that manner. The Plaintiff asked the Court to enjoin the Defendant from publishing the news items which he received from the Plaintiff broadcasting station.

The lower court, and an intermediate court, gave judgment for the Defendant and refused to so enjoin the newspaper. This judgment was affirmed by the Supreme Court of Germany, *even though the Plaintiff's allegations that the defendant had first received the news from the broadcasting station, were found to be true.*

It must be borne in mind that the Defendant in that case paid for his license to listen on the radio. It must also be remembered, and we repeat, *that the Petitioner in the case at bar is presumed to have purchased the newspaper it is alleged to have read to its audience.* The Defendant in the German case and the Petitioner in this case, stand in identical positions, according to the allegations of Respondent's Bill of Complaint.

We quote only the pertinent sections of this lengthy opinion of the Supreme Court of Germany for the convenience of this Court because the opinion can be obtained in the report as aforesaid:

> "—it is not shown that the republication of the news item from the broadcast—as is here contended by defendant in his newspaper *is*

against public policy. The court admits that such an offense generally exists when one appropriates the result of the arduous and expensive labor of others without substantial expense of time, work and money and for the purpose of competition. It is inclined to agree with a case decided by a trial court of Berlin and affirmed by the intermediate court (JW. 1929, 1251 and Arch. F. Funkr. 1, 666) according to which it was a violation against section 1 Un1WG. for a subscriber to appropriate and utilize for business purposes the description of the last round of a prize fight between two well known boxers by a sport reporter who was present at the ringside, and who broadcast his description from the ringside. In the present case however the intermediate court declines in contradistinction to the prize fight case to see anything against public policy because here the whole transaction is not reproduced but only a news item is involved even though it be a very fast one. But this quality is possessed inherently by all radio news items as compared with news appearing in a paper which must be printed before it can be circulated. *It declines to see in the utilization of the news through immediate publication in an extra distributed without cost anything which is against public policy.* (Italics ours.) — —

"—In consequence the intermediate court refused to see any violation of section 2 Un1WG, and section 826 BGB and dismissed the complaint after showing that when the question was discussed at the press convention of Geneva on August, 1927 (Bl. f. Funkr., Heft 10 of October, 1927, 179ff.) the experts there assembled were unable to reach an agreement in regard to the question of public policy but were rigidly divided. The result was that merely the principle was agreed to "*that the publication of any news*

item is dependent on only one condition, namely that the item should have been received by its publisher rightfully and not through unfair competition. The intermediate court again stresses the fact that Defendant as an authorized subscriber has received the news rightfully.

Appellant contends that this reasoning is wrong. It urges that the above related case JW 1929, 1251 is to be followed. In that case a phonograph record of a broadcast address made without the license of the sending company was in question. It says that the appropriation of a result obtained by great trouble and expense by others for the purpose of the use of the appropriator in his competition with others is here present through the printing of the extra. The cost of the effort was not only high in general but was greater than usual here because a special reporter was sent to Friedrichshafen and was connected with the Stuttgart station by a special wire. It further contends that defendant by designating his news item as a telegram made it appear to the public as if it had through special organization and special expense of money succeeded in getting this news in a particularly expeditious manner. As against the holding that public policy is not violated plaintiff claims that the provisions of the license, on which the intermediate court relies, have not penetrated into the sphere of general knowledge particularly because it is partly of a technical nature. It claims that the general opinion of the subscribers is that they are not entitled to utilize the broadcast in any manner. It further contends that the disquisitions of the intermediate court in regard to the deliberations of the press convention of Geneva in August, 1927, are erroneous so far as part B of the resolutions are concerned which declares that it is under all circumstances desirable that

news items published by radio be protected in such a manner that the publication of such news items during a certain time is legitimate only on condition of mentioning the source and paying a fee.

This much of this contention is true that the resolution formulated by the Press convention of Geneva is not limited to the principle stated by the intermediate court. Apparently only a general principle was involved which the convention was desirous to stress and which was to precede the proposed regulation for cases A and B (unpublished news, published news) though clarity of purpose was sacrificed.

The sentence stressed by the intermediate court is found in the resolution concerning the regulation of the relevant case B (published news). Whether the general principle announced before the treatment of cases A and B, that the "principle that the publication of any news should refer also to case B is despite the general word "publication" which is not confined to the first publication is at least doubtful. This point however need not be discussed since the purpose of convening the conference was to bring about the regulation of the protection of the news service on the basis of an international treaty. The negotiations therefore do not present any basis for an already existing protection of the news service according to German law.

It remains to examine whether the presumptions of Section 3 UnlWG., which appellant apparently contends is applicable because defendant by labelling the news as a telegram has made it appear that he obtained this news especially and expeditiously through some special organization, must be eliminated as there is no finding of fact and the plaintiff has not made any assertions in this regard.

We cannot agree with the appellant that the principles of the above mentioned decision (JW 1921, 1251) are applicable without more. There can be no doubt but that the utilization of a broadcast by reproducing it on phonograph records and thus taking permanent possession of it commercially, as was done in that case, is contrary to section 1 UnlWG. and section 826 BGB. Such conduct is inconsistent with the views of decency in commercial affairs. An unscrupulous utilization of another's production, the result of great effort and cost, through mere mechanical means in a manner which has the same effect without any improvement and without any addition of any kind is involved. No attempt is present to perfect anything which might protect the attempt from being designated unfair competition. For all progress in culture, particularly in technical matters, is based on the existing achievements and is in fact a further development of them. Furthermore an entire reproduction the result of independent work on the part of the sending company is involved which is entitled to protection against unfair practices just as is the case in regard to any accomplishment or goods so far as it is not entitled to more complete protection. Such more complete protection is imaginable on the basis of an absolute right of the sending companies against the whole world, a violation of which by a third person would be forbidden even though his action is not wrongful. Such legal principle as applied to radio waves however is connected with very great difficulties.

The situation is different in the present case, where, assuming the statements by the plaintiff to be true, there is only a single utilization of a broadcasted news item. Such a case is distinguishable from that just discussed. This is true even of a republication of news items from an-

other newspaper. Such republication is not a violation of any copyright (compare section 18 Abs. 3 LitUG. of June 19, 1901, and Art. 9 Abs. 3 of the revised treaty of Geneva). *Such items are not entitled to copyright***."* (Italics ours.)

"—**Only the utilization of a single news item is involved, though such item was of the intensest interest to the general public. This item had no value beyond the time when it became available and the utilization by defendant consisted merely of taking advantage of the expeditiousness of radio. The item by itself was not an accomplishment of the sending company, it was not the result of its independent labor but because in a few hours, in consequence of its publication in newspapers and extra, the general property of the entire German people. *It should be again pointed out that such items according to section 18 Abs. 3 LitUG. enjoy no copyright when they are contained in newspapers and there is no reason to apply a different rule to them when they are circulated through the radio.* Nor is any such theory indulged in the interested circles. This circumstance and the contents of section 1 of the license conditions issued to listeners and which are generally known and according to which the prohibition against utilization has no application to radio broadcasts, was of importance in deciding the question whether the defendant has acted against public opinion and was properly so considered by the intermediate court. *In accordance with the present condition of the law the complaint is without foundation and the appeal must be dismissed.*"—(Italics ours.)

This opinion clearly shows that the German Supreme Court was chiefly influenced by the fact that news reports, as such, were not protected by the

German Copyright Law. News reports are not protected under the American Copyright Law. At the Common Law, the rights in news ended at publication. The only test is, *was the news received rightfully?* In the case at bar and in the German case, it was. In the International News Service case, it was not, therefore, there was unfair competition.

The above decision of the German Supreme Court follows the reasoning of the majority opinion and the opinion of Mr. Justice Brandeis in the case of International News Service vs. Associated Press (supra), which case we now take up. The majority held there was no property right in published news as did the dissenting opinion. The cleavage of the Court occurred over the question of whether there was unfair competition.

In applying the simple test of the German case to the case at bar, the ruling in the International News Service case need not be disturbed. Here, the news was received *rightfully* and there was no unfair competition. Obviously, respondents have no remaining *property right* in the *published* and *distributed news.*

In the International News Service case, the facts as therein set forth are inapplicable to the case at bar. It was held, as stated, by a majority opinion, Mr. Justice Brandeis, dissenting, Justice Holmes and

Justice McKenna writing a separate opinion, that a cooperative association of newspapers organized for the gathering, distributing and publishing of news, may enjoin a rival news agency from making merchandise of and *selling*, (not giving away), as its own, news received by bribery and taken from the *bulletins* issued by the competitive association; and that as between rival news gathering and publishing agencies, no general and absolute property in news, as such, is essential to the right of such a news gathering and publishing agency to seek protection in a Court of Equity against such competition by a rival agency.

Thus, the distinction between that case and the case at bar is seen. As between two newspaper news gathering agencies, such as the International News Service and the Associated Press, the court held that the question did not turn or hinge upon whether news was property or not, but, the question hinged solely on *rival and unfair methods.* The element of bribery and other unfair methods are not alleged in the case at bar. *Petitioner received this news, or is presumed to have received it in the lack of averments to the contrary, by purchase.*

Therefore, in the case at bar, the question hinges upon *whether news remains the property of the publisher after its dedication and sale to the public,*

including petitioner, and not on unfair competition; and not on rival and unfair methods of collecting and selling news as merchandise because Petitioner does not sell its news to others for resale or distribution.

This Court treated the International News Service case entirely upon the question of *unfair competition in business.* In that case, both agencies sold the news. In the case at bar, the Petitioner is presumed to have purchased this news, and *gives it away* in the interest of public education and public information, in furtherance of the general obligation impressed by the government on radio stations to serve the public interest, convenience and necessity.

At this time, we point out that the government annually appropriates some fifty odd millions of dollars to cover the deficit of the post office department, which is caused by the Second-class postal privileges of newspapers. Respondents cannot, therefore, reasonably and consistently scoff at the public interest involved in this case as being short-sighted. The government, in the case of newspapers, spends millions of dollars in order to encourage a wider knowledge of public happenings, whereas, as in the present case, radio performs this same service freely and gladly.

So, newspapers and radio, by virtue of this government benevolence being enjoyed by both, cannot be heard to object too strenuously to the public enjoying a greater use of property which has not only being paid for by purchase and by subsidy, but, as aforesaid, has been voluntarily dedicated to public use. Both parties hereto, do not stand in the same shoes as ordinary private property owners. There is a quasi-public interest in both industries.

Examining the International News Service case more fully, we now quote and comment upon the separate opinions of Mr. Justice Holmes and Mr. Justice Brandeis in order to more clearly demonstrate the question in this case. We have quoted the majority opinion heretofore—

"Mr. Justice Holmes, dissenting

"When an uncopyrighted combination of words is published there is no general right to forbid other people repeating them — — in other words, there is no property in the combination or in the thoughts or facts that the words express. — —

"Property depends upon exclusion by law from interferenee, and a person is not excluded from using any combination of words merely because some one has used it before, even if it took labor and genius to make it. — — — But as, in my view, the only ground of complaint that can be recognized *without legislation* is the implied misstatement, it can be corrected

by stating the truth; and a suitable acknowledgment of the source is all that the plaintiff can require. I think that within the limits recognized by the decision of the Court the defendant should be enjoined from publishing news obtained from the Associated for —— hours after publication by the plaintiff *unless it gives express credit to the Associated Press.*" (Italics ours.)

"Mr. Justice Brandeis, dissenting."

"No question of statutory copyright is involved. The sole question for our consideration is this: Was the International News Service properly enjoined from using, or causing to be used gainfully, news of which it acquired knowledge by lawful means (namely, by reading publicly posted bulletins or papers purchased by it in the open market) merely because the news had been originally gathered by the Associated Press and continued to be of value to some of its members, or because it did not reveal the source from which it was acquired?

The "ticker" cases, the cases concerning literary and artistic compositions, and cases of unfair competition were relied upon in support of the injunction. But it is admitted that none of these cases affords a complete analogy with that before us. The question presented for decision is new, and it is important.

News is a report of recent occurrences. The business of the news agency is to gather systematically knowledge of such occurrence of interest and to distribute reports thereof. The Associated Press contended that knowledge so acquired is property, because it costs money and labor to produce and because it has value for which those who have it not are ready to pay;

that it remains property and is entitled to protection as long as it has commercial value as news; and that to protect it effectively, the defendant must be enjoined from making, or causing to be made, any gainful use of it while it retains such value. An essential element of individual property is the legal right to exclude others from enjoying it. If the property is private, the right of exclusion may be absolute; if the property is affected with a public interest, the right of exclusion is qualified. But the fact that a product of the mind has cost its producer money and labor, and has a value for which others are willing to pay, is not sufficient to ensure to it this legal attribute of property. The general rule of law is, that the noblest of human productions — — knowledge, truths ascertained conceptions, and ideas — — become, after voluntary communication to others, free as the air to common use. Upon these incorporeal productions the attribute of property is continued after such communication *only in certain classes of cases where public policy has seemed to demand it.* These exceptions are confined to productions which, in some degree, involve creation, invention, or discovery. But by no means all such are endowed with this attribute of property. The creations which are recognized as property by the common law are literary, dramatic, musical, and other artistic creations; and these have also protection under the copyright statutes." — — — (Italics ours.)

Mr. Justice Brandeis holds, in substance, that news is not property, *and the majority of the Court do not differ with him on this point, because the majority opinion rests upon the methods employed, rather than the property rights involved.*

Here, the tables are turned, because there were no

unfair methods used. The news was received rightfully and presumably by purchase, as in the German case. *In order for the Circuit Court's decision to be upheld, this Court must now establish an absolute property right in published and distributed news, as such——something that this Court refused to do in the International News Service case.*

Respondents rely likewise upon an unreported case of Associated Press vs. Sioux Falls Broadcasting Company, decided April 8th, 1933, by the United States District Court for the State of South Dakota. That case was similar to the one at bar, but the District Court in the case at bar, refused to follow it.

A lengthy criticism of this Sioux Falls case is reported in the "Air Law Review", Vol. 4, (1933) at P. 323. The most pertinent portions of this article reads, and it is premised on sound reasoning——:

"Unfair competition —— Broadcasting —— Injunctions —— News Dispatches

——Complainant, a New York Corporation, is engaged in the business of gathering news for newspapers who are its members. Defendant operates Radio Station KSOO and one of its regular features is the broadcasting of news items three times daily. These items are read verbatim over said radio station from newspapers who are members of complainant corporation. Complainant asked for an injunction to restrain defendant from pirating such news. Held, a

preliminary injunction granted. Complainant and its members have a property right in the news gathered by such complainant. Broadcasting such news constitutes unfair competition for which a court of equity will render a preliminary injunction, restraining the defendant from pirating or disseminating news gathered by complainant or its members for twenty-four hours after the first publication of said news in a newspaper which is a *member of complaint* corporation.

Though there were earlier cases dealing with premature publication of stock quotations and the like, (Board of Trade vs. Christie Grain & Stock Company, 198 U. S. 236 — (1904); Hunt vs. New York Cotton Exchange, 205 U. S. 322 (1907); National Telegraph News Co. vs. Western Union Telegraph Company (1902) 119 Federal 294) the question of actual news "Piracy" first arose in the case of Associated Press vs. International News Service (1918), 248 U. S. 215, In that case, a divided court (The majority opinion was written by Mr. Justice Pitney. Mr. Justice Holmes wrote a separate opinion to which Mr. Justice McKenna concurred. Mr. Justice Brandeis wrote the dissenting opinion. Mr. Justice Clark took no part in the consideration or decision of the case.) decided that news constitutes a quasi-property right, and that the pirating of news by one news agency from another, will be enjoined by equity as constituting "unfair competition'. Mr. Justice Brandeis in a strong dissenting opinion pointed out that to constitute unfair competition, fraud or force must be involved in the doing of the acts complained of, and the mere reprinting of news from a newspaper purchased in the open market involves neither fraud nor force. The basis for the majority opinion that this constitutes unfair competition, is that there is appropriation

without cost to itself of value created by the plaintiff. Mr. Justice Brandeis, dissenting, says at page 257, 258:

> "To appropriate and use for profit, knowledge and ideas produced by other men, without making compensation or even acknowledgment, may be inconsistent with a finer sense of propriety; but with the exception indicated above (inducing breach of trust in getting the information), the law has heretofore sanctioned the practice.— — The unfairness in competition which has hitherto been recognized by the law as a basis for relief, lay in the manner or means of conducting the business; and the manner or means held legally unfair, involves either fraud (passing off your articles as that of the competitor) or force (physical or moral coercion, or by inducing breaches of contract or of trust) or the doing of acts otherwise prohibited by law."

Mr. Justice Brandeis at page 248 says that the only ground for holding the defendant liable, is that by printing the news it impliedly states that it got it through its own efforts, and that if the defendant would acknowledge the source, plaintiff would have no cause for complaint. He says:

> "But as, in my view, the only ground of complaint that can be recognized *without legislation* is the implied misstatement, it can be corrected by stating the truth; and a suitable acknowledgment of the source is all that the plaintiff can require."

The present decision (Sioux Falls Case) follows

the majority opinion of the United States Supreme Court in the International News Service Case, although it would seem that the wiser policy would have been to follow the dissenting opinion in this case at least. The broadcasting station is not really as much of a competitor as another news agency. People do not buy a newspaper merely for the news it contains. They purchase a paper for all its features of which the news items are only one, and the knowledge of the news items will not prevent them from purchasing the newspaper for its other benefits. The educational value of the news broadcasts must also not be forgotten. To many the radio is the only opportunity to acquaint themselves with our political occurrences and the progress of civilization. These broadcasts are consequently of great benefit to the public. The fact that Congress, refused the passage of a Bill (Senate Bill 1728, 48th Congress, 1st Session) to give newspapers copyright protection for the news they gathered, should be borne in mind by our courts, and thus prevent them from falling into the error of judicial legislation. It is to be hoped that if this case is appealed, the higher court will tend to follow the dissenting opinion of Mr. Justice Brandeis." — (Italics ours.)

We call the court's attention to another very important article, "Piracy of Broadcasting Programs", written by Louis G. Caldwell, former Federal Radio Commission Counsel, and reported in 30 Columbia Law Review, page 1047. In this article, starting on page 1095, Mr. Caldwell discusses such a problem, as we have here at bar.

These articles are pertinent to this petition. At

least, they show the importance of the questions involved in this application, and the substantive reasons why this Court should exercise its discretion and grant the writ in order that the subject matter may be thoroughly reviewed.

Mr. Caldwell in his article discussed both, the International News Service case and the German case, and in regard to the appropriation of published or broadcast news items by a newspaper or radio station, Mr. Caldwell observed at the conclusion of his article:

> *"——Where, however, the appropriation is simply of a news report of factual content, whether by a broadcasting station or by a newspaper, I am inclined to think that our courts will hold the same as the German Reichagericht (although newspapers are to a substantial extent in competition with broadcasting stations) for substantially the same reasons."* (Italics ours.)

Petitioner realizes that these articles are not precedents. They are merely intelligent discussions of the subject matter involved. On certiorari, the application is addressed to the discretion of the Court. These articles prove that the subject matter is unsettled and disputatious; that the contentions are important, and that the merits, if reviewed, are in one way or the other of great interest to the public.

The Circuit Court in this case has attempted to write into the law something that is not in the law

——that is to say, the exclusive use of news for any arbitrary time. Why twenty-four hours as Respondents request? Why eighteen hours as the District Court felt bound to enter on the Mandate of the Circuit Court? Why not only one or, say, two hours?

A king might die; a nation might fall, or the entire world may be embroiled in a world-wide war within the space of two hours. Is this Court going to submit to the proposition that news of that character should become the exclusive property for twenty-four hours of the Associated Press simply because it transmitted it first?

Approaching this point from a different direction, why do news organizations and individuals copyright their literary property under the law, if it is not recognized that news and such property becomes public property after they, themselves, make it public? Can a news organization by first transmitting a record from the court house, become the sole possessor of the right to use that news for twenty-four hours? An affirmation of any such principle would be against public policy.

These questions are important. It would be absurd to attempt to argue the merits of this cause twice, therefore, certiorari should issue in order that they may be intelligently considered. This is

especially true when it is considered that the Circuit Court, even conceding it used the most painstaking efforts, could only find twelve articles used from the local paper during the course of twelve months. Remember, Petitioner cannot be heard in Seattle—ninety miles away. Obviously there was no competition between the Petitioner and the Seattle Times and Seattle Post-Intelligencer.

The public interest will be best served by granting the Petitioner's request. We again call this Court's attention to the fact that the newspapers in the United States have attempted, as early as the year of 1884, to secure legislation, giving them the exclusive right to use news for as short a time as *eight hours*, not twenty-four hours, and failed. This entire question at bar should have been addressed to the legislature —— not the Court.

Senate Bill No. 1728, 48th Congress, 1884, First Session, was introduced, and that Bill provided:

> "That any daily or weekly newspaper, or any association of daily or weekly newspapers, published in the United States or any of the territories, there-of, shall have the sole right to print, issue, and sell, for the term of eight hours, dating from the hour of going to press, the contents of said daily or weekly newspaper, or the collected news of said newspaper association, exceeding one hundred words."

The Senate Committee on the Library reported

that this Bill should not pass. The records hereof may be obtained from the Journal of the Senate, 48th Congress, First Session, at page 548.

Mr. Justice Brandeis in his dissenting opinion in the International News Service case pertinently referred to this abortive piece of special legislation and remarked in substance, that the legislature felt it was unwise to recognize a property right in published news.

Time after time, the newspapers have failed to secure such legislation in the United States, as well as in England. See House of Lords, Sessional Papers, 1898, Vol. III, Bill No. 21.

In the English law, as well as in American Statutes, there are no provisions in the law giving even a limited copyright in news as such, and, no court should do so in fact, because this would open the door to other evils, greater than that sought to be remedied.

News is not property. Facts are public and not private property. News of events of spontaneous origin is, and has always been held to be, public property and complainant has no property right in such news. Davies vs. Bowes (209 Federal 56.)

Equity recognizes a property right in, or in the commercial value of an organization or service de-

vised and used to obtain and confidentially handle and distribute news of events of spontaneous origin, and will use its powers to protect such service, *as long as it remains confidential, and no longer; or to the point of publication, and no further.* Board of Trade vs. Christie Grain Co. (198 U. S. 236.)

We repeat, that no question of copyright under the statute is involved. *The cases concerning profit and performing rights in literary and artistic compositions, along with the ordinary cases on unfair competition will not support the Circuit Court's injunction.* None of these cases afford a complete analogy to the facts at bar. Petitioner should not be subjected to the present injunctive odium without being heard by this Court, especially where so much of the law, the facts, and the issues are in dispute. The damages, of which Respondent complains, have been removed by its own admission in its Brief as heretofore set forth.

During the course of the Argument, the District Court inquired, in substance,

> "**whether there is any authority prohibiting one local newspaper from picking up and publishing verbatim what has been published in another local newspaper?"

Petitioner and respondent made a search of the authorities on this question and no case or authority

could be found that prohibits one local newspaper from "picking up" and publishing verbatim what has been published in another local newspaper. *Respondent admitted it could not find any such authority.*

To be sure, there are many cases involving artistic, scientific, and literary compositions under the copyright laws, where one rival publisher infringed the right of some other publisher and was enjoined, but Petitioner and Respondent were not able to find any case granting a "judicial copyright" so to speak, on news. On the contrary, many cases were found which openly, as well as impliedly, gave the right of one local newspaper to copy verbatim from another.

In fact, the newspaper profession sanctions such "lifting of news" from one paper by another. A textbook, "THE RIGHTS AND PRIVILEGES OF THE PRESS," on page 87, states as follows:

> "Whether an afternoon newspaper may lift from a morning paper has never been decided by the courts, *but the custom of the profession seems to sanction such practice.*" (Italics ours.)

This statement alone, is enough to establish affirmatively that respondent had no rights under the common law in a case like the one at bar. There is no statute that gives respondent any relief. The Common Law did not. *Can a court do so without*

resorting to legislation?

Respondents, the Associated Press, are well aware of this custom and practice of the journalistic profession, as stated in the above text. *The activities of respondent in the case of the Tribune Company of Chicago vs. Associated Press,* (116 *Federal* 126) *proves this.*

In this case (Tribune Company of Chicago vs. Associated Press) (supra), the Chicago Tribune secured the exclusive privilege, by written agreement with the London Times, to use such parts of special war dispatches of the London Times as the Chicago Tribune might select from that paper and have telegraphed to America to the Tribune. The news dispatches taken from the London Times were cabled to America and published in the Chicago Tribune on the same morning and almost simultaneously with the publication of the Times in London. The Associated Press, the alleged miscreant in that case, but the respondents at bar, without any compunction, finesse, apology or hesitation, *pirated,* according to the Chicago Tribune, these news dispatches which were alleged to be the exclusive property of the Chicago Tribune. The evidence showed that the London Times gave the Chicago Tribune the exclusive right to copyright all of these news dispatches in America. A copy of

each published issue of the Chicago Tribune was thereupon deposited with the United States Copyright Office in its entirety.

But notwithstanding the Associated Press' actual knowledge of the Tribune's agreement with the London Times, and notwithstanding the Tribune's rights under its alleged copyright, and notwithstanding the simultaneous publication of this exclusive news in London and Chicago at practically the same time, the Associated Press correspondent in London, simply bought a London Times for a farthing at the exact instant of its London publication, and took such dispatches from the London Times columns as he chose and cabled these dispatches to the Associated Press and its member papers, thereby enabling all newspapers who were members of the Associated Press to publish these exclusive news dispatches at the same time and instant, and sometimes sooner, than the Chicago Tribune.

The Chicago Tribune in that case requested the Federal Court to enjoin the Associated Press from so using its news as above stated. The Court held that it could not protect the Chicago Tribune from this alleged onslaught by the Associated Press, for the reason that *since the copyright law did not apply to newspapers, the Associated Press was with-*

in its rights in so using this news, notwithstanding the Chicago Tribune paid thousands of dollars for this privilege, while the Associated Press received the same privilege for a few shillings by merely purchasing the paper in London.

The court recognized in that case, that news, in the absence of a protective statute, could not be protected once it was published. The court stated:

> " As the exclusive right of publication at common law terminates with the publication in London, no protection then exists beyond that expressly given by the Statute. " (Meaning the Copyright Law) —— (Notation ours.)

Thus, it is seen that the respondent has enjoyed the privilege of "lifting news," so to speak, from other newspapers for years, *once it has been published.* They and their members have and are now enjoying the privileges extended them by the Government through the second-class postal rates. Now, however, they begin to speak in sonorous tones about property rights when radio attempts to do the same thing that the government has been indirectly paying newspapers to do, with an important exception, *radio receives no governmental subsidy for performing this public service.*

If a wide dissemination of news is not conducive to a better informed electorate and within the public interest, would the government stand the ex-

pense and attempt to further it by such a subsidy as aforesaid?

To be sure, newspapers are entitled to protection up to the time of publication, *but no longer;* they are entitled to protection as long as news events remain *confidential* and *within their own circle,* as against competitive news gathering agencies and others, *but never past the point of publication, and in no case, after distribution and sale.* Custom, the authorities, and respondents own practice recognize this plain rule.

The respondents cause of action in this case depends upon whether respondent can show a common law right in its its news *after publication and distribution.* News, in order to be protected as such, must be copyrighted and the news in question was not so protected. A newspaper cannot be copyrighted in its entirety under the U. S. Copyright Laws; and further, the authorities recognize that no right remains in news after its publication and distribution. The Common Law terminates its protection on publication, and unless there is a Statute reserving to newspapers this right, news becomes common property once it has been published and *distributed.*

This Court in the International News Service case (Supra) rejects respondent's theory in the case at

bar that a newspaper or a radio cannot copy from one another after publication and *distribution*. Mr. Justice Pitney specifically stated on page 235, in discussing news as property — —

> "::except for matters improperly disclosed, or published in breach of trust or confidence, or in violation of law, *the news of current events may be regarded as common property.*" (Italics ours.)

In the case of Dodge Corp. vs. Comstock (251 N. Y. S. 172) the Court quoted the following statement with approval:

> "The distributor's knowledge of news is his property as long as he keeps it to himself or communicates it only to others on condition that they do so. He will be protected against any one who *surreptitiously obtains this information from one of its members. subscribers or employees,* or by any form of pilfering or unfair means." (citing a great many cases.)
>
> "In every one of these cases the court found that the defendant got the news or the quotations *surreptitiously,* and enjoined him for that reason. They abundantly support an injunction on the first grounds mentioned in the opinion of the court."
>
> *"But if the distributor publishes, to use a word in this connection which I think has been unreasonably criticised or abandons, or dedicates, or communicates his information to the world, his rights of property in his information and his right to be protected against the use of it is gone."* (Italics ours.)

As we have constantly reiterated, the test is "*was the news received fairly?*" In the case of Atlantic Monthly Publishing Co. vs. Post Pub. Co. (27 Fed. (2nd) 556), the defendant had republished a matter which had appeared in the plaintiff's publication, upon which a copyright had been applied for, *but not granted at the time of the re-publication by the Defendant.* The Court stated that the plaintiff had no right of action unless the matter had been copyrighted, and remarked on page 559 as follows:

> "At the time when the bill was filed, the defendant had, therefore, no existing copyright. This being so it had no right to an injunction. The only equitable relief sought by the bill is the injunction. As the right to it did not exist when the bill was filed, the suit must be dismissed. It is like a suit on a patent, which had expired before the bill was brought."

The only cases which prevent one publication from publishing news items out of another publication involve the republication of items in trade papers, such as Building and Engineering plans and specifications. In those cases the courts have rightfully enjoined one Trade paper from copying the plans and specifications appearing in another Trade paper, because such plans are confidential matter, and trade secrets, and is not news or mere current events, or items or factual content, as appear in newspapers, or as broadcast over the radio.

The Federal Courts invariably hold that a newspaper is not capable of being copyrighted. All of the authorities hold that the Common Law right in news ends at the point of publication, and the courts have no judicial authority or right to place a judicial copyright on this news. If they did, then there would be no excuse for the existence of the Copyright Statute. The Federal Constitution has delegated that sole right to Congress.

Under Article I, Section 8, paragraph 8, of the United States Constitution, it is stated that Congress only, is empowered:

> "**to promote the progress of science and useful arts, by securing for a limited time to authors and inventors the exclusive right to their respective writings and discoveries."

CONCLUSION

The decision of the Circuit Court was wrong. It should be reviewed and reversed. The writ should issue, if for no other reason, than to clarify and restate the law on the subject matter involved. *If the respondent's interests are of so important a character and the public interest would be best served were the law such as the Circuit Court erroneously held it*

to be, then there is presented a proper subject for the Congress — — not the Courts.

Respectfully submitted,

CLARENCE C. DILL,
Washington, D. C.

KENNETH C. DAVIS,
Seattle, Washington.

WILLIAM H. PEMBERTON,
Olympia, Washington.

Attorneys for Petitioner.

APPENDIX "A"

In the District Cout of the United States for the Western District of Washington, Northern Division

In Equity—No. 1087

THE ASSOCIATED PRESS, a corporation,

Complaint,

vs.

KVOS, INC., a corporation,

Defendant.

PRELIMINARY INJUNCTION

THIS CAUSE coming regularly on for hearing, the Honorable John C. Bowen, Judge of said Court presiding, in the Court Room of the above entitled Court; in the City of Seattle, King County, State of Washington, upon the records and files herein, in-

cluding writ of mandate from the United States Circuit Court of Appeals for the Ninth Circuit, and upon application of the complainant herein, complainant appearing by J. W. Kindall of its solicitors and defendant appearing by Kenneth C. Davis of its solicitors, and the matter having been heretofore submitted to the Court and the Court being well and fully advised in the premises,

IT IS HEREBY ORDERED that from and after the time when the said persons shall severally have knowledge of this preliminary injunction, and until the further order of the Court, defendant and its officers, agents, servants, employees, successors and assigns, and all others acting for or by permission of defendant be and they hereby are restrained from appropriating and broadcasting any of the news gathered by the Associated Press for the period following its publication in Complainant's newspapers during which the broadcasting of the pirated news to KVOS' most remote auditors may damage the Complainant's papers' business of procuring or maintaining their subscriptions and advertising or during such period as said news may retain or has commercial value, either bodily or by excerpts, by rearrangement, or after rewriting, it being found for the purpose of this preliminary injunction that such period is eighteen (18) hours after the first

publication of said news in any newspaper which is a member of complainant corporation.

DATED this 27th day of February, 1936.

By the Court:

JOHN C. BOWEN,
Judge.

ATTEST:

EDGAR M. LAKIN,
Clerk

By S. E. LITCH,
Deputy.

Presented by J. W. Kindall.

O. K. as to form:

.....
Solicitors for complainant

.....
Solicitors for Defendant

Received copy —

KENNETH C. DAVIS

APPENDIX "B"

In the District Court of the United States for the Western District of Washington, Northern Division

IN EQUITY—No. 1087

THE ASSOCIATED PRESS, a corporation,

Complainant,

vs.

KVOS, INC., a corporation,

Defendant.

PRELIMINARY INJUNCTION

PROPOSED BY DEFENDANT

THIS CAUSE coming regularly on for hearing, the Honorable John C. Bowen, Judge of said Court presiding, in the courtroom of the above entitled Court, in the City of Seattle, King County, State of Washington, upon the records and files herein, including writ of mandate from the United States Circuit Court of Appeals for the Ninth Circuit, and upon application of the complainant herein, complainant appearing by its solicitors, Howard and Kindall and John W. Davis, and defendant appearing by its solicitors, Kenneth C. Davis, Clarence C. Dill, and William H. Pemberton, and the matter having been heretofore submitted to the Court and the Court being well and fully advised in the premises,

IT IS HEREBY ORDERED that from and after the time when the said persons shall severally have knowledge of this preliminary injunction, and until

the further order of the Court, that defendant and its officers, agents, servants, employees, successors and assigns, and all others acting for or by permission of defendant be and they hereby are restrained from appropriating and broadcasting any of the news gathered by the Associated Press for the period following its publication in Complainant's newspapers during which the broadcasting of the pirated news to KVOS' most remote auditors may damage the Complainant's papers' business of procuring or maintaining their subscriptions and advertising, or during such period as said news may retain or has commercial value.

Dated this ..... day of ....., A. D. 1936.

By the Court:

.....

Judge

ATTEST:

.....

Clerk

.....

Deputy

Copy received —
J. W. Kindall,
Of Solicitors for Complainant

The foregoing form of order refused and to such refusal exception is allowed defendant this 27th day of February, 1936.

John C. Bowen,
U. S. Dist. Judge.